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JUSTICE AND EQUITY: WOMEN AND INDIGENOUS WORKERS

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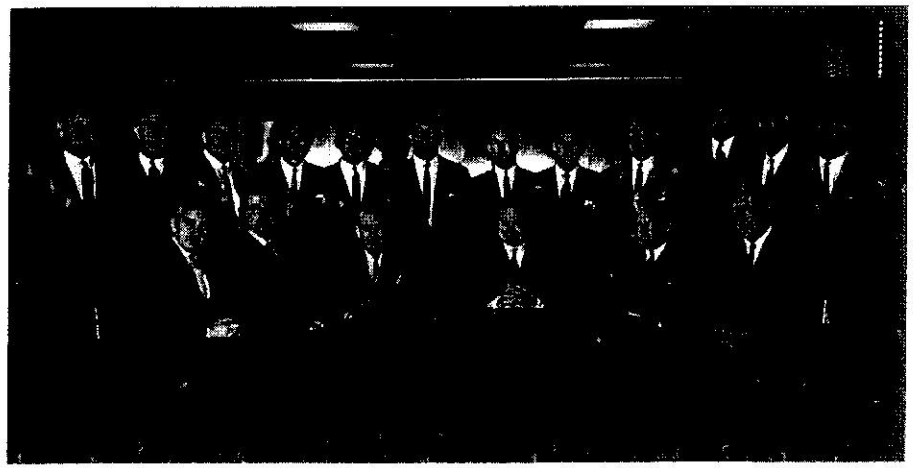
Throughout much of its history, the Australian wage-fixing system has been viewed as a significant champion of social justice and equity. At its inception, Alfred Deakin stated that 'no measures ever submitted by any legislature offer greater prospects of the establishment of social justice and of the removal of inequalities than those which are based on the principle of conciliation and arbitration' (*CPD* 30 July 1903: 2883). Much later, reflecting on the period after the Second World War, Kirby (2002: 563) noted that the federal tribunal's role as 'the guardian of industrial equity and the ultimate enforcer of the Australian nation's commitment to a "fair go" in industrial relations' seemed indisputable. In practice, however, justice for all has been an elusive target, and the notions of wage justice pursued have often been conflictual and contested.

Hopes for wage justice in Australia were associated largely with the system's capacity to moderate the power imbalance between employers and employees, with two distinct principles of justice gaining prominence in practice. The first was the notion of a 'fair and reasonable' living wage, elaborated by Higgins in the *Harvester* case in 1907 as a wage adequate for 'a human being living in a



The Commission in 1963. Sir Richard Kirby, President (seated fourth from left) is flanked by his Deputy Presidents. From left to right they are Justices Sweeney, Gallagher, Wright, Ashburner and Moore. His Commissioners stand behind. From left to right they are Commissioners Winter, Apsey, Horan, Chambers, Donovan, Findlay, Senior Commissioner Taylor, Commissioners Portus, Austin, Gough, Hood and Matthews. The dress of this tribunal contrasts with that of Sir Raymond Kelly's Court.

civilized community' (1907 2 CAR 3–4). This reflected an idea of natural justice 'more imperious and ancient than any bargain between man and man, namely, that wages ought not to be insufficient to support a frugal and well-behaved wage earner' (Pope Leo XIII, *Rerum Novarum*, cited in Timbs 1963: 24). 'Wage justice' in this sense is not only 'fair' in the sense of striking a balance between wages and profits, but consistent with basic human dignity and what Marshall (1950) later expressed as the social rights of citizenship. A second notion of wage justice was based on wages commensurate with factors such as effort and skill, and thus a comparative justice with respect to relativities between workers, regardless of location or market demand. Neither of these notions precludes the possibility of 'wage equity' in the sense of equity between men and women or Indigenous and non-Indigenous Australians; in fact, if implemented inclusively they offer the potential to ameliorate gender and race inequality. However, both may be implemented in ways that ignore, or even entrench, such inequities.

The early arbitration system, as part of what Castles (1988) termed a 'historic compromise' involving tariffs and immigration restrictions alongside regulation of

wages, delivered a form of industrial citizenship based on economic protectionism. In comparison with more market-reliant approaches, these arrangements enhanced the capacity to introduce norms of social justice into wage fixation. As Eveline notes, however, protectionism can also be 'a recipe for inequity, injustice and exclusion'. White women and Indigenous people, for example, were excluded from direct benefits, and became the objects of other types of 'protection' – as wives and mothers, or as wards of the state – with very different implications for industrial citizenship (Eveline 2001: 144–6).

The story of women under the arbitration system to be told in this chapter is of transition from a system based on notions of wage justice that relegated them to a second class industrial citizenship, to a system in which overt discrimination has been removed but the indirect benefits of earlier notions of wage justice and a centralised institutional framework are being lost. While the earlier arrangements produced forms of wage justice without equity between men and women, 100 years later the risk is that a closer approximation of gender equity will be achieved only alongside an erosion of broader wage justice – in effect through an extension of disadvantage to males. The central theme in the story is thus the tension between these different types of 'wage justice' and between the indirect and direct effects of the wage determination system.

Indigenous workers were also disadvantaged relative to the direct beneficiaries of the protectionist measures underpinning arbitration (white males). In comparison with women, however, for whom separate rates were established in awards, disadvantage under the arbitration system was manifest more in the exclusion of groups such as Indigenous stockmen from award coverage. For these workers, moreover, there was an interweaving of industrial issues with concerns such as land rights. As Aboriginality has not been addressed as directly or as frequently as gender difference in the industrial relations system, the story of Indigenous workers in this chapter is shorter, with the depressed labour market conditions of Indigenous relative to non-Indigenous Australians requiring a broader social analysis beyond the scope of this chapter and its concentration on the wage determination system.

For both Indigenous workers and women, the emphasis here is on selected cases and decisions that have had significant implications for wages and conditions. The chapter is necessarily simplified, and in particular glosses over

important differences within the categories of 'women' and 'Indigenous Australians'. The story of women thus concentrates primarily on white women and their situation relative to white men; while the impact of the system on Indigenous Australians is largely the story of its impact on a particular group of Aboriginal men (stockmen).

INDIGENOUS AUSTRALIANS AND THE WAGE DETERMINATION SYSTEM

The engagement of Indigenous Australians in the 'work' that white settlers brought to the country was from the start intermittent and unregulated. In the north, food and tobacco were accepted as wages for assisting European hunters, and informal arrangements developed for work in a number of primary industries, including pearling and prospecting. Dispossessed of land and increasingly dependent on European food, the majority of Aboriginal workers in the north became involved in the cattle industry, which employed around 10 000 from 1900 through to the 1960s (Broome 2002: 124–5).

The federal wage-fixing system that was initiated in 1904 did not bring the protection it offered white men; rather, the Indigenous population found itself on the other side of the protective barrier. Alongside the immigration restrictions directed at Asian and Pacific Islander labour that underpinned protection of white men's wages and jobs, legislative means of excluding Aborigines from particular forms of employment were adopted at both State and federal levels. For example, Commonwealth mail contracts were limited to 'white labour', and 'white grown' sugar attracted a bonus and rebate on excise (McCorquodale 1985: 4–5). The fair and reasonable wage adopted in the *Harvester* judgment in 1907, which rested on these protective arrangements, was thus achieved for white men through the explicit exclusion of others.

Protection for the Indigenous population was of a different type – essentially under State and Territory ordinances that cast them as wards. Legislative measures adopted in the late nineteenth and early twentieth centuries required Europeans to obtain permits to employ Aboriginal people, and specified terms and conditions such as the provision of rations, clothing and medical care (Broome 2002: 128). In the Northern Territory, the regulations typically prescribed a small

wage supplemented by provision for needs such as food and clothing, with support for a wife and child also provided under ordinance (1967 113 CAR 652). The extent of this protective legislation effectively placed the working conditions of Aboriginal Australians outside the jurisdiction of the wage determination system, and they were explicitly excluded from a number of awards.

In a series of pastoral industry cases beginning in the 1920s, exclusion from federal awards was maintained on the basis that award coverage and rates of pay would mean job losses for Indigenous workers, and that unions' claims for inclusion were disingenuous attempts to achieve this goal. Refusing the application to include Indigenous workers under the award in a 1924 case (*The North Australian Industrial Union v JA Ambrose and Others*), for example, the Court President, Justice Powers, observed, 'I know the union is anxious to reduce the number of aboriginals to be employed in proportion to white men' (1924 20 CAR 507, 511). Similarly, in *North Australian Workers Union v Northern Territory Pastoral Lessees Association* in 1928, the union was accused of seeking 'to exclude aboriginals from employment upon cattle stations so as to make work for white employees' (1928 26 CAR 623). This position was maintained in subsequent applications over the next three decades.[1]

As the following section of the chapter will illustrate, tension between equal pay and access to employment was also frequently evident in the Court's approaches to women, although in their case much greater legitimacy was accorded to the protection of white men's jobs. Equal pay for women, in the few early cases where it was applied, was expressly used as a means to ensure they could not compete for 'male' jobs. White stockmen's jobs were not, however, to be protected in the same way. Women in men's jobs were perhaps perceived as more of a threat, as they were less confined to a narrow industry sector than the stockmen; but it is also apparent that differences of race were seen as justifying a much greater differential in wages and conditions. In a 1944 case, for example, it was observed that 'it would be inadvisable and even cruel to pay [Indigenous workers] for the work they can do at the wage standards found to be appropriate for civilized "whites"' (1944 53 CAR 215).

Both equal pay and access to jobs can be seen as aspects of justice in wage determination, and prioritisation of one over the other necessarily takes place in the context of broader political ideas and policy approaches. Thus, it was

in the context of 'assimilation' and rising concerns for Indigenous rights in the 1960s, and with the federal government supporting the case for change, that the Commission reversed its position on the Indigenous stockmen. The application in 1965 to vary *The Cattle Station Industry (Northern Territory) Award 1951* to include Aborigines and thus, in effect, award equal pay was referred to a full bench, and was seen as a test case 'to settle the principle of excluding racial groups from award protection' (Sharp 1966: 158). The decision taken by President Kirby, Justice Moore and Public Service Arbitrator Taylor was delivered in March 1966. It was presented as the only possible decision consistent with the principles of wage justice guiding the wage determination system:

> We consider that overwhelming industrial justice requires us to put aboriginal employees in the Northern Territory on to the same basis as white employees . . . [the pastoralists] have not discharged the heavy burden of persuading us that we should depart from standards and principles which have been part of the Australian arbitration system since its inception. We do not flinch from this decision which we consider is the only proper one to be made at this point in Australia's history. There must be one industrial law, similarly applied, to all Australians, aboriginal or not. (1966 113 CAR 651, 666–9)

Thus, although the Commissioners accepted the pastoralists' evidence that 'aborigines are unable to work as well as whites because of cultural and tribal factors' (1966 113 CAR 658),[2] they nevertheless recognised that industrial justice required a decision for equal pay.[3] The primary concern, for the government as well as the Commission, was that although the decision was consistent with assimilation policy, in that it delivered 'substantive and symbolic equality for Indigenous men in a major northern industry', in the Northern Territory assimilation was in practice dependent on the capacity of pastoral properties to support Aboriginal workers and their dependants in remote areas (Rowse 1998: 128). Large-scale labour-shedding in the pastoral industry would disrupt these arrangements and risk overcrowding in towns, missions and settlements. The Commissioners sought to minimise labour-shedding by delaying implementation of the decision until December 1968, and foreshadowing a simplification

of the 'slow worker' clause to facilitate its application to the pastoral industry (1966 113 CAR 651, 668). They also emphasised what they saw as the benefits of retaining Indigenous labour: 'an indigenous labour force resident on the station with cultural and spiritual ties to the land, even if somewhat inefficient, has many advantages over a floating white labour force which has no particular knowledge or feeling for the land in which the station lies' (1966 113 CAR 667).

Nevertheless, significant displacement of labour did occur following the case (Rowse 1998: 128; Bunbury 2002: 107); but the 1966 decision was only one of a series of changes that contributed to this outcome. Additional factors included reduced demand for Aboriginal labour on cattle stations following capital investment over the period from the 1950s and the effects of drought into the 1960s, as well as the Indigenous population's extended access to pensions and unemployment benefits by the early 1970s (Rowse 1993, 1998). Erosion of the interdependence of pastoralists and Aboriginal communities was thus well under way by the 1970s, and it is unlikely that a ruling to continue the exclusion of Indigenous stockmen from award conditions would have stemmed the tide.

For some Indigenous workers, the problem with the Commission's decision in 1966 was not the risk of job loss, but rather the delay in implementation of equal wages and conditions that 'would amount to their being treated as fellow human beings' (Attwood 2000: 9). This fundamental sense of injustice echoed concerns over land rights, and a series of strikes, which began over conditions at Wave Hill, extended to other areas in 1967 and became more inclusive protests (Attwood 2000; Riddett 1997).

Land rights gained an increasing profile alongside the ensuing move away from 'assimilation' towards 'self-determination', and an expanding policy agenda included a focus on economic opportunities beyond mainstream employment and particularly in remote areas. Funding for commercial projects, from the Commonwealth Fund for Aboriginal Enterprises set up in 1969, to various schemes run under the Aboriginal and Torres Strait Islander Commission (ATSIC), has been one of the strategies to extend economic opportunities. Most significantly, the Community Development Employment Projects (CDEP) program, set up in 1977, has been widely adopted. Its aims were to build community, provide employment and develop skills (Spicer 1997: 24), and it contributed to the 'Indigenous sector' of publicly subsidised, representative service and policy

organisations that have provided Indigenous employment in the post-assimilation era (Rowse 2002). Rowse (1993) has argued that CDEP was devised partly as an attempt to deal with the surplus population created by the declining capacity of the pastoral industry to support Indigenous people in remote areas. It provides Aboriginal communities with funding equivalent to unemployment benefits for the entire community, and allows local-level decisions about the allocation of work and funds. While debates about its efficacy are beyond the scope of this chapter, what is important here is recognition of the varied 'employment' situations of Indigenous Australians, and the extent to which their working conditions fall outside the scope of the formal wage determination process.

The defining feature of Indigenous employment patterns and conditions in the post-assimilation era remains the significant variation between remote and urban areas. The ongoing movement into urban and near urban areas – only 26 per cent of the Aboriginal population lived in rural areas in 2001,[4] compared with 56 per cent in 1971 (ABS 2001 Census, unpublished data; CBCS 1971b: 1) – has meant the increasing importance of programs to enhance opportunities in mainstream labour markets. The Aboriginal Employment Development policy adopted in 1987 with the aim of employment equity by 2000 significantly boosted spending on employment programs, and equal employment opportunity goals in the public sector have sought to increase the representation of Indigenous Australians in public employment. However, in spite of the spread of both mainstream and Indigenous-specific labour market and training projects in the 1990s, employment growth in mainstream labour markets has been minimal (Taylor and Hunter 1996).

Estimates of the labour market disadvantage of Indigenous people are complicated by substantial regional differences in the type and conditions of employment, as well as by the assumptions inherent in the vocabulary of labour force statistics. As Smith (1991: 23) notes, terms such as 'unemployment' and 'labour force participation' are less meaningful where the formal labour market is seen as partially irrelevant. With these caveats in mind, Figure 5.1 shows the consistently lower levels of labour force participation of Indigenous people compared with all Australians for the period 1971–2001,[5] as well as the considerably higher levels of unemployment experienced. Had CDEP participants been counted as

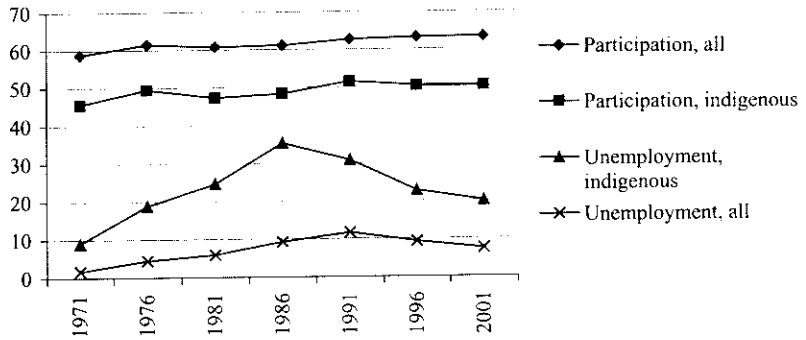


Figure 5.1 Labour force participation and unemployment, 1971–2001 (per cent).
Source: Census data, 1971–2001

'unemployed', the unemployment rate in 2001 would have been 34 per cent rather than the recorded 20 per cent (ABS 2001: table I13).

Underpinning these statistics is a picture of consistent labour market segregation and disadvantage for both male and female Indigenous workers. Aboriginal employees are highly concentrated in two industry sectors (health and community services, and government administration), and substantially overrepresented in comparison with non-Indigenous employees in relatively low-paid occupational groups such as Labourers and Related Workers. Private sector employment accounts for a lower proportion of Indigenous than non-Indigenous employment, and even industries such as mining, which often operate in close proximity to remote Aboriginal communities, have provided limited and mainly low-skilled employment opportunities (Cousins and Nieuwenhuysen 1984: 2–3). The median personal income for Indigenous Australians in 2001 was only 72 per cent of that of all Australians, and at this time over 40 per cent of Indigenous employees worked part-time compared with around a quarter of the population as a whole (ABS 2001: table I29), reflecting in part the prevalence of part-time work in CDEP programs.

The capacity of the industrial relations system to assist more equitable outcomes is varied, given the greater proportion of Indigenous compared with non-Indigenous workers located in remote communities and outside the regulated wages system altogether. Lack of award coverage for staff of many Indigenous

organisations is also noted by Altman and Hawke (1993: 8). Even for those under formal arrangements, the diminishing regulatory scope of the industrial relations system over the 1990s, in particular through limitations to the scope of awards and union rights (Hunter 1997: 454), suggests persistent difficulties in delivering wage justice.

Similar arguments can to some extent be made for (white) women, who – in comparison with white men – tend to be concentrated in part-time and lower paid jobs and are thus more vulnerable in a deregulated environment. Historical parallels with the experiences of women under the arbitration system can also be seen in the extent to which arguments for equal pay could be driven as much by the desire to protect white men's jobs as by a concern for social justice. The story of women under the arbitration system, however, is both more extensive, given the specific and detailed ways their wages and conditions have been regulated, and more illustrative of its (often indirect) benefits.

WOMEN AND THE WAGE DETERMINATION SYSTEM

The arbitration system has been only one of a wide range of influences on employment equity for women over the past 100 years, and it has responded, as well as contributed, to the changing socioeconomic framework over that time. One of the most marked labour market changes during this period has been the increasing engagement of women in paid employment. As Figure 5.2 shows, following a relatively static situation in the first half of the twentieth century, women's – and particularly married women's – labour force participation rates in Australia have risen dramatically alongside changes in social attitudes, family structures and the occupational composition of the labour market.

The most significant changes in labour market composition have arisen with the expansion of the service sector and growth of part-time work in industries such as retail and hospitality. Much of the increase in participation shown in Figure 5.2 has been into part-time work (that is, fewer than 35 hours per week), and by 2001, 45 per cent of female employees, and 47 per cent of married female employees, worked part-time, whereas only around 15 per cent of male employees were part-timers (ABS time series data). In contrast, the first collection of data

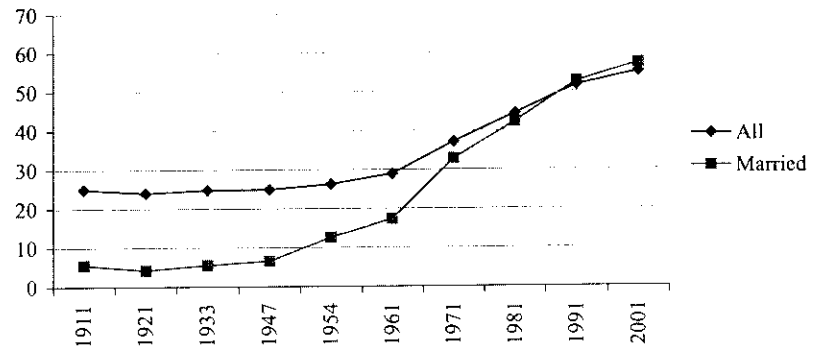


Figure 5.2 Women's labour force participation, 1911–2001 (per cent)
Source: Census data, 1911–86; ABS 6291.0.55.001: table 01

on part-time work in Australia (in the 1933 census) showed that it accounted for around 8 per cent of employment at that time, and that it was more prevalent for males (9 per cent) than for females (5 per cent), reflecting its concentration in the primary production sector, particularly forestry.

Although there have been significant changes in the industry and occupational distribution of women's employment over the period shown in Figure 5.2, sex segregation has remained a defining feature of the labour market. At the beginning of the twentieth century, women's employment was highly concentrated in private domestic service, a poorly remunerated category that accounted for around 30 per cent of female workers. By the 1960s, the proportion of working women engaged in private domestic service had fallen to less than 3 per cent, and women's employment patterns had shifted towards industry sectors such as commerce and public administration.[6] Occupational concentration has remained strong, with sales and clerical jobs accounting for much of women's employment from the 1960s, and teaching and nursing consistently representing a large proportion of women's employment in professional categories.

The arbitration system has reflected rather than directly shaped these ongoing patterns of labour market segregation, but its influence has been somewhat more direct on the issue of gender wage equity. Unlike the situation for Indigenous workers, women's wages have been determined within the wage-fixing system from its inception – with both positive and negative consequences. Figure 5.3 illustrates trends in female–male earnings ratios from the early 1900s, showing

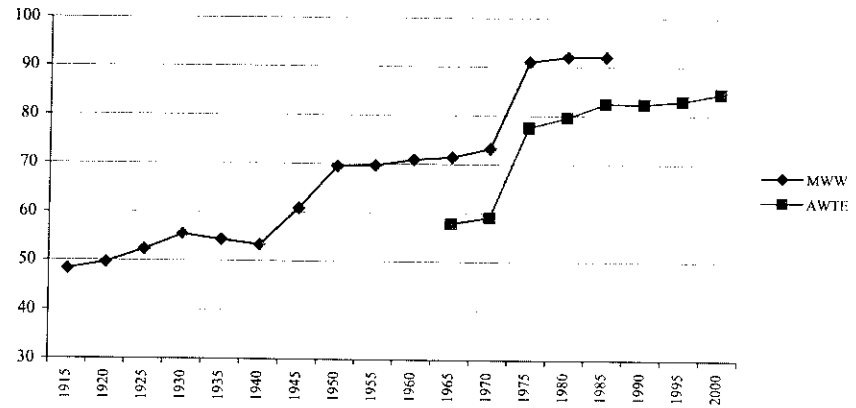


Figure 5.3 Women's earnings as a percentage of men's, 1915–2000 (minimum weekly wage and average weekly total earnings)
Notes: Minimum weekly wage (MWW) based on average nominal rates of wages payable to adults for a full week's work (weighted by industry), as prescribed in awards, determinations and agreements. Average weekly total earnings (AWTE) based on total weekly earnings of adult, non-managerial, full-time employees.
Sources: Commonwealth Bureau of Statistics Labour Reports (ABS 6000.0); Withers et al. 1987: 155–7; ABS 6306.0

the significant improvements in gender pay equity that have been made, albeit with a substantial gender earnings gap still evident at the beginning of the twenty-first century.

The female–male earnings ratios shown in Figure 5.3 are based on minimum weekly wages (as the most direct indicator of differences attributable to the wage tribunals) and average weekly total earnings (which incorporate differences in payments over and above the minimum) (see Chapter 4). As the graph shows, the two measures exhibit similar trends, with the wider gender pay gap in total earnings reflecting gender inequality in a range of additional payments that have largely fallen outside the scope of pay equity provisions. Trends in the ratios may reflect changes both in women's pay rates relative to men's and in the distribution of women's employment (for example, between and within occupations). However, the changes shown in the 1940s and, most dramatically, in the 1970s are too rapid to be accounted for by distributional changes – rather, their origins lie in specific wage determination decisions that will be elaborated below.

The full story of the impact of the wage determination system on women's working conditions over the past century is beyond the scope of a single chapter. Attention here is on selected highlights: the impact of a 'living' wage in the early 1900s; changes emerging during and following the Second World War; adoption of equal pay principles and their implementation in the 1970s and 1980s; and decentralisation from the 1990s. Decisions taken during these phases illustrate the complex ways in which the wage determination system has affected women, initially with quite explicit forms of exclusion and differential treatment on the one hand, but – often indirect – benefits on the other, reflecting the centralised system's capacity to provide some protection for the industrially weak.

The living wage

When the arbitration system was established, only around 20 per cent of working age women, and around 5 per cent of married women, were in the labour force (see Figure 5.2). Consistent with notions of 'bourgeois philanthropy' (Barrett and McIntosh 1980), the prevailing view was that the engagement of wives and mothers in paid work would risk moral impropriety and degeneration of the family. Ideally, at least for the white middle class, women were 'protected' from both financial and moral risks by their husbands or fathers. In line with the goal of a White Australia (pursued through the *Immigration Restriction Act 1901* and exhortations to 'populate or perish'), their most important role was seen as 'mothers of the white race', or as the domestic servants supporting middle-class women in this task.[7]

The formal establishment of a living wage, and the exclusion of women from the ranks of 'breadwinners' entitled to receive it, were logical outcomes within this social context and under the economic policy framework of new protectionism. Exclusion from breadwinner status formalised women's inferior status in the labour market. The inherent contradictions – the need to pay men as breadwinners even if they had no family to support, and the denial of a breadwinner wage to women who did – were glossed over as anomalies in subsequent cases and not fully resolved until 1974. Occasional deviations from the male breadwinner logic were seen as necessary where lower female wages could risk job loss for men. In the 1912 *Rural Workers Union and United Labourers' Union v Mildura Branch*

of the Australian Dried Fruits Association and Others case (1912 6 CAR 61),[8] for example, the threat of cheap female labour underpinned Higgins' decision to award equal pay to female fruit-pickers:

> There has been observed for a long time a tendency to substitute women for men in industries . . . and . . . it is often the result of women being paid lower wages then men. Fortunately for society, however, the greater number of breadwinners are still men. The women are not all dragged from the home to work while the men loaf at home, and in this case the majority even of the fruit-pickers are men. As a result, I come to the conclusion that in the case of the pickers, men and women . . . should be paid on the same level of wages; and the employer will then be at liberty freely to select whichever sex and whichever person he prefers for the work. (1912 6 CAR 61–72)

In 1919, Higgins applied similar logic in ruling that equal margins for skill should be paid in order to assist men in their 'last stand' against the 'gentle invaders' who were displacing them from tailoring jobs (*Federated Clothing Trades of Australia v JA Archer and Others* (1919) 13 CAR 647, 701).[9] In addition, the protection of women's morality occasionally emerged as a justification for equal pay; for example, a 1924 case addressed the issue of equal pay for women involved in the production of 'pernicious rubber goods' such as condoms, in the hope of discouraging employers from hiring women in such work (Patmore 1991: 170).

In the majority of cases, however, the male breadwinner logic implicit in the family wage applied. Women working in male-dominated occupations or women with dependants were seen as exceptions to the rule, and the basic wage was not adjusted for 'exceptional cases' by offering more to a woman having to care for family members, or indeed less to a woman who 'has a legacy from her grandparents, or . . . boards and lodges free with her parents, and merely wants the money for a dress' (1912 6 CAR 62). Women, it seemed, could be quite extravagant on matters such as dress, and while deliberations over a suitable basic wage for women in 1919 did consider clothing along with other necessities, a modest amount was deemed appropriate:

> If the girls will have their finery at the sacrifice of other things more necessary, that is their business; but probably it is not fair to force the employers to pay for all that a girl may fancy as being necessary for human requirements. At the same time, we must not forget the important social function of girls' dress as a bulwark for self-respect . . . (1919 13 CAR 647, 695)

The issue of a female basic wage to reflect the costs of an individual living in reasonable comfort had been addressed in the 1912 *Rural Workers* case and the 1917 *Theatrical and Amusement* case, with different outcomes: 75 per cent of the male rate in the former and 54 per cent in the latter (Plowman 1992: 247). The matter was subsequently considered more comprehensively in the *Clothing Trades* case of 1919. As in the *Harvester* case, Higgins drew on evidence of living costs as well as existing rates, particularly a 1918 case in South Australia which had estimated living costs for females. The result of his deliberations was to affirm a basic wage for women set at 54 per cent of the male rate; a level subsequently followed in decisions of federal and State tribunals over the following three decades. Moreover, although the proportions changed over the years, with higher rates being set in some industries[10] and the federal standard rising to 75 per cent in 1950, different minimum rates for men and women were retained until the 1970s.

The notion of a living wage that evolved in these early cases has thus been of considerable significance in establishing conventions for dealing with issues of women's pay and working conditions over a long period of time. As a form of 'wage justice', the living wage offered a level of social protection beyond what might be achieved through bargaining in the marketplace. Although the extent to which this object was attained has been the subject of much debate, the *Harvester* decision did establish a standard significantly higher than the existing rate for 'unskilled workers'. Subsequent decisions of the Court provided wage levels and working conditions (such as sick leave provisions) in regulated employment that gave some substance to the notion of a 'wage earners' welfare state' (Castles 1985).

For women, however, 'the imposing edifice of a "family wage"' (Ryan and Conlon 1989: 91) placed a formal barrier in the way of gender wage equality.

It was not the case that the notion of a male breadwinner and its associated female–male wage differentials were peculiarly Australian phenomena, or direct products of the wage-fixing system's institutional structure. In the United Kingdom, for example, the notion of a family wage 'was an important element in late nineteenth century respectability' that underpinned unequal treatment for women in employment (Hinton 1982: 28–9); and pursuit of a family wage in the United States at the beginning of the twentieth century similarly reflected the idea that mothering was 'women's primary life purpose' (Figart et al. 2002: 3–4). Also, the idea that women's wages should be sufficiently low to ensure that motherhood remained an attractive option was voiced in debates over women's wages in both the United Kingdom and the United States (Royal Commission on Equal Pay 1944–46: 189; Figart et al. 2002: 4). By reinforcing existing patterns of sex segregation in efforts to protect men's jobs (Bennett 1984: 34) and entrenching principles of wage determination that outlived their original social context, the institutional framework in Australia nevertheless created particular barriers to change.

At a broader level, though, the regulatory scope of the system, which embodied a form of wage justice through a degree of protection from the market, brought some benefits for women. Bennett (1984: 32–4), for example, notes that in the female-dominated clothing trades in 1919, adoption of a 44-hour week was clearly designed to benefit women rather than simply ensure they were uncompetitive with men. Similarly, examples of significant wage gains suggest that the institutional machinery, at both federal and State levels, delivered benefits that would have been unlikely to accrue through unregulated bargaining. While Reekie (1989: 286) argues that women have been marginalised under an arbitration system that 'bonded male capital and male labour in a validation of men's experiences', her analysis of the *New South Wales Shop Assistants* case of 1907 shows that women gained significant increases on their pre-award rates, and also proportionately more than men. Similarly, Frances' (1993) research on the boot trade shows that the wages and conditions of women working in this industry during the time it remained outside the arbitration system consistently lagged behind those for clothing workers, which had been established in the 1919 *Clothing Trades* case; and that the level of sex segmentation was significantly greater under direct bargaining arrangements than under the federal arbitration system

(Frances 1993: chs 7 and 8). Nevertheless, the primary legacy of these early years was a basic wage set at a little over half that awarded to men, and it was only in the context of labour market shortages generated by the Second World War that this would be effectively challenged.

The Second World War and its aftermath

While there was some variability in the rates established in different awards during the 1920s and 1930s, showing how imprecise estimates of 'male breadwinner' needs were, the basic principles for determination of women's wages remained in place, even in the face of a much greater reliance on notions of 'capacity to pay' throughout the depression in the 1930s. Inconsistencies in the application of a 'family wage', such as its payment to men without families or inadequacy for large families, were dismissed as beyond the Court's jurisdiction, with the latter seen as the province of social welfare policies such as child endowment (1934 33 CAR 149). Although women's employment patterns changed somewhat over the 1920s and 1930s, they were still predominantly concentrated in private domestic service, and overall levels of female participation remained relatively static (see Figure 5.2).

Mobilisation around the issue of equal pay was nevertheless well under way by the end of the 1930s. The formation of the Council of Action for Equal Pay (CAEP) in 1937, for example, brought together unions and women's groups that viewed the wage-fixing system as an important avenue for change (Ranald 1982: 277; D'Aprano 2001: 78–9). The CAEP's approach to equal pay was guided by the ideas of Muriel Heagney (1935), for whom the path to equal pay for the sexes lay in occupational rates established with no reference to the sex of the worker. It was this notion of the 'rate for the job' that underpinned the CAEP's efforts to achieve pay equity, in contrast with the United Associations of Women (UAW), which under Jessie Street's guidance in the late 1930s advocated staged increases in the female rate from 54 to 80 per cent of the male rate. These differences between the organisations caused some tensions, particularly over the UAW's attempt to present its preferred model to the 1940 Basic Wage Case (Ranald 1982: 281–3). At this stage in the history of the arbitration system, however, they were not admitted by the Court.

While attempts to raise women's wages above 54 per cent of men's were refused in the 1930s, establishment of the Women's Employment Board (WEB) in 1942 provided an important stimulus for change. Although the WEB's history was brief, and its decisions resisted, by the end of the 1940s economic and labour market conditions had changed so markedly that a return to the old 54 per cent rule of thumb could not be justified.

The WEB's task was to establish rates for women in those jobs where they were (temporarily) replacing men. Consistent with the government's need to attract women into these jobs, wages could be established within the range of 60–100 per cent of the male rate, based on assessments of women's efficiency and productivity relative to men. Although there was undoubtedly gender bias in the way efficiency and productivity were determined under the WEB (McMurchy et al. 1983: 111–12; Ryan and Conlon 1989: 126–30), the board was not constrained by notions of a family wage, and by 1944 it had awarded rates of up to 100 per cent of the male wage to over 80 000 women. These were seen as radical decisions, as evidenced by the level of resistance from employers and by widespread refusal to pay WEB rates (Beaton 1982: 90, 91).

Additionally, the WEB rates generated dissatisfaction among those women who fell outside its jurisdiction, many of whom were still paid only 54 per cent of the male rate. Within the arbitration system, however, there was little inclination to alter long standing principles of female wage determination. The Court's view was that women covered by WEB rates would be relinquishing their jobs after the war and thus that this was only a temporary aberration in wage determination history (Ryan and Conlon 1989: 133). In a 1943 case seeking a higher rate for munitions workers, existing principles for female wage determination were reiterated:

> so long as the foundational or basic wage for women is assessed according to a standard different from that which is the basis of the foundational or basic wage – a family wage – for men, the Court will not . . . raise the general level of women's minimum wages in occupations suitable for women, and in which they do not encounter considerable competition from men . . . To do this would at once depress the relative standard of living of the family as a group . . . as compared with that of the typical single woman wage-earner. (1943 50 CAR 191, 213)

The WEB's short history came to an end in 1944 and, in continuing efforts to attract women into 'vital' industries, the government sought a decision from the arbitration system on the adequacy of women's wages in these areas. Faced with the Court's continued reassertion of its needs-based principles of wage fixation, the government enacted the National Security (Female Minimum Wages) Regulations, which set a 75 per cent minimum rate in all vital industries (Ryan and Rowse 1975: 26; Beaton 1982: 95). In this context, and with the assumption that many women would permanently leave the labour market following the war proving inaccurate (see Figure 5.2), the 1949–50 Basic Wage Case established 75 per cent of the male minimum as the new standard for women. While the Australian Council of Trade Unions' (ACTU) claim for equality in minimum wages was rejected on the rationale that the basic wage was still essentially a 'social wage for a man, his wife and family', and something that married women supported, the majority decision reflected the fact that few women were now paid at the 54 per cent rate, and that industry obviously had the capacity to pay the higher rate. Thus, '[e]conomic forces and not the Court are today largely dictating the wage rates' (1950 68 CAR 698, 816, 818).

Although this decision provided a change in proportions,[11] it retained familiar arguments about needs and family responsibilities in spite of greater deference to economic forces and capacity to pay. Nevertheless, as Figure 5.3 shows, this was an era of rapid change in women's relative pay, and while this reflected a combination of economic, political and social influences, institutional interventions in wage fixation were fundamental in its achievement. Not all these interventions occurred through the arbitration system itself, which resisted the pace of change, but without the framework of awards established under this system the impact of the decisions taken would undoubtedly have been more limited in scope and longevity.

In spite of a subsequent attempt to reduce the female rate to 60 per cent in the 1952–3 Basic Wage inquiry, the new 75 per cent rate was maintained due to the lack of any evidence of adverse economic outcomes. Pressures were building for full equality. Activism on the issue continued to escalate (see, for example, D'Aprano 2001 on the role of Kath Williams and others), with an ACTU conference on equal pay in 1956. Decisions made by the Commission during the 1960s further weakened the notion of a family wage, leaving the way open for a more direct approach to equal pay.

Equal pay cases

Pressure to adopt equal pay provisions increased during the 1960s with the growth of the feminist movement and the continuing escalation of female labour force participation, particularly within the expanding service sector. Married women's participation increased from around 17 per cent in 1961 to 33 per cent in 1971 (see Figure 5.2), a trend clearly involving the widespread engagement of women with children in paid employment and challenging the 'male breadwinner' assumptions that underpinned wage determination principles. In 1966, section 49(2) of the Commonwealth Public Service Act, which decreed that '[e]very female officer shall be deemed to have retired from the Commonwealth service upon her marriage', was belatedly removed,[12] although not without some debate over the extent to which this might reduce the birth rate or produce a generation of neglected children (Sawer 1996).

Rising acceptance of pay equity goals was evident both at an international level, with the adoption of a number of gender equity conventions, particularly the International Labour Organisation's (ILO) Convention 100 on Equal Remuneration in 1951, and in Australia with a series of equal pay initiatives in New South Wales, Tasmania, South Australia and Western Australia. At the federal level, the decision to award equal margins in a 1964 review of the Clothing Trades Award, not on the basis of 'protecting male employees' but 'to prescribe proper margins for work done' (1967 118 CAR 286, 300), and delivery of equal increases to men and women along with the adoption of a 'total wage' in the 1967 National Wage Case, were indicators of receptivity to an equal pay claim.

The ACTU responded in 1969 with a claim to raise women's pay by an amount equivalent to the difference between the former male and female basic wages. Although rejecting concerns that an equal pay decision would have adverse economic consequences, the Commission was not prepared to grant the claim in total, opting instead to establish principles consistent with those in State jurisdictions to guide applications for equal pay, with successful claims to be phased in over a three-year period.

The nine principles adopted placed specific limits on the scope of equal pay claims, which could be made only for adult males and females working under the same determination or award, employed in work normally performed by both

An equal pay demonstration on the steps of the Melbourne Trades Hall: Bob Hawke stands alongside Jack Sparks, the Victorian president of the Australasian Meat Industry Employees Union, and the woman on the right is Zelda D'Aprano.

males and females (expressly excluding work 'essentially or usually performed by females') and of 'the same or a like nature' (1969 127 CAR 1142, 1158–9). These restrictions allowed only a relatively narrow concept of 'equal pay for equal work', and effectively by-passed the majority of women who were employed in female-dominated occupations. As a number of authors have noted (Short 1986: 318; Isaac 1998: 702), this case in effect reiterated the principle adopted in the 1912 *Rural Workers* case, that women should be entitled to equal pay where they worked in 'male' occupations and performed the same work. Estimates of its scope suggest that it affected only around 18 per cent of the female labour force (1972 147 CAR 172, 177); and even where it was applicable, if the male award rate was lower than the minimum wage, women's wages were lifted to the lower rate only (Hutson 1971: 127; Hunter 1988: 159).

Nevertheless, in comparison with equal pay provisions to emerge in other countries, the principles adopted had a number of positive features that reflected

INTERVIEW WITH JUDITH COHEN AND PAULINE GRIFFIN

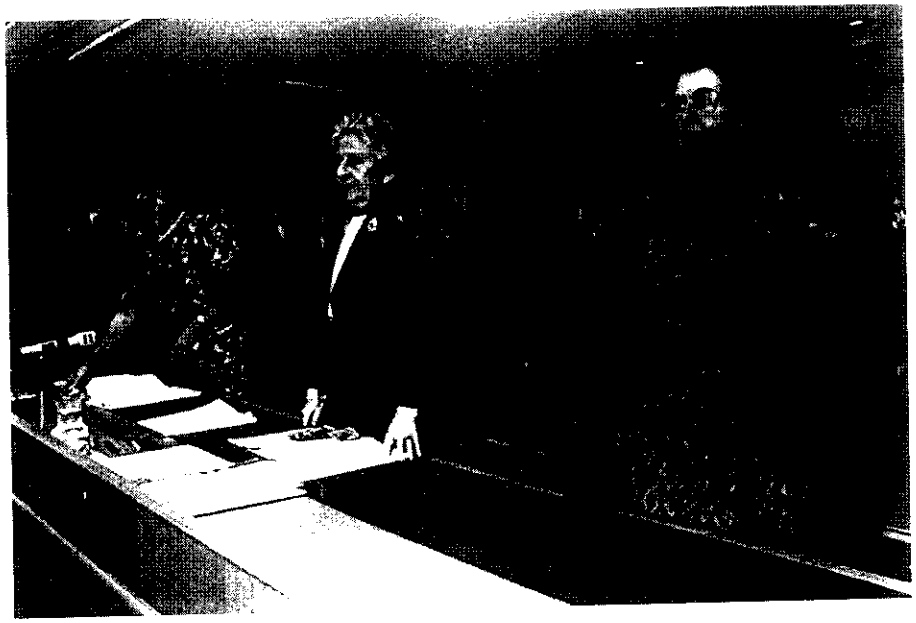
Judith Cohen was appointed Commissioner in 1975 and was Deputy President from 1980 to 1991. Pauline Griffin was Commissioner from 1975 to 1990. These extracts are taken from an interview conducted by Judy Hughes (a transcript is held in the Sir Richard Kirby Archives):

Pauline Griffin: In 1975, when we were both appointed, industrial relations generally was very much a male field. I had been a member of the Industrial Relations Society and the Institute of Personnel Management in New South Wales . . . There were some very, very notable pioneer women in both fields, but they were very small, the numbers, in comparison with the men.

I remember in 1962, when I was being interviewed for participation in the Duke of Edinburgh's Commonwealth Study Conference, that the then Secretary of the Department of Labour said, 'I suppose one day we will have to put women like you on the Commission' . . . I remember thinking at the time, oh, wouldn't that have been wonderful. I am ten years too late . . . In fact I wasn't and Judith and I were the first two Commissioners, women Commissioners, appointed . . .

Judith Cohen: It was an act of positive discrimination by the Whitlam government. There wasn't a pool of women with industrial relations experience to appoint to the benches . . . When I happened to mention that I didn't have industrial relations experience, I was told, 'Well, you are a lawyer, aren't you, you know how to read a bloody Act'.

It didn't worry me whether it was a male or female environment, but when I got into the Commission I did wonder what all those Commissioners who had come up from practice in the Industrial Relations Commission were going to think about me, who they knew had not been in the industrial relations area . . . About three or four days after we were appointed, one of them, Len Matthews, who was a very nice man, he was the 'shop steward' of the Commissioners, knocked on my door, came in and sat down and said, 'Judith, do you mind if I have a little talk with you?'



In 1989 Justice Judith Cohen (centre), Jan Marsh, a Deputy President (left), and Pauline Griffin (right), a Commissioner, made history when they constituted the first all-female bench in the history of the tribunal.

And I thought, oh, God, here it comes and he sat down and with a very serious face he said to me, 'We have been talking and the Registry have asked us to ask you – we don't know how you are to be addressed. Downstairs they are putting your name on the list of Commissioners on the board, they are all Mr Commissioner; what are we going to put against yours?' And with a perfectly straight face I said, 'I think if you just drop the prefix it will be all right, Len' . . . And I also said, 'It wouldn't hurt if in due course you dropped your own prefixes as well'.

Pauline Griffin: One case I had was where one of the employers, I think, called me Madam Commissioner and somebody else called me Mrs Commissioner and the other one called Miss Commissioner; and I said, 'When the three of you have sorted out my marital status would you please just let me get on with hearing what you have got to say?'

Judith Cohen: Frankly . . . I was surprised how easily I was accepted, not only within the Commission but by the parties as well . . . And it just astounded me; they really just wanted somebody to pour it all out to, they wanted somebody to resolve the problem. They didn't care whether you were male, female or a ten-headed hydra. They really didn't – it didn't worry them.

Pauline Griffin: But they were delighted when you got a grasp – they didn't always expect that you would – that you got a grasp of something that to them seemed a bit complex. I had a wonderful one once, and I was actually appearing for another Commissioner who was delayed in getting to Sydney due to some air problem, and he had explained to me what he was going to hear and the employers got up and they said their whole piece, and it was quite a complex issue in the middle of the indexation guidelines. Then the union bloke got up and said all his piece, and then the employer got up again and the union bloke said, 'Sit down, you fool, she got it the first time'. I wasn't supposed to hear that and, of course, I did.

There were very few women lawyers in industrial relations. I mean the law firms that used to practise in the industrial relations jurisdiction had very few women at any level. That changed dramatically.

Judith Cohen: Gradually more and more women started popping up at the bar table for both the employers and the unions. When I left in 1991 – when I retired – one of the last cases I presided over was the parental leave case. There were days when the whole bar table was female, and it was a big bar table, all the State governments were represented, all the major interest parties, and mainly by female advocates, and that had changed in the period.

the wage determination system in which they were embedded. For example, although unions were required to bring specific cases before the tribunal with evidence for each classification affected,[13] the process was not reliant on individual grievances, but operated through an award-based system that extended gains from successful cases beyond individuals and single enterprises. The principles adopted were clear that 'consideration should not be restricted to the situation in one establishment, but should extend to the general situation under the determination or award concerned'. Additionally, and in line with historical norms of wage justice, there was clear prohibition against the interpretation of 'value' in purely market terms – 'the expression of "equal value" should not be construed as meaning "of equal value to the employer" but as of equal value . . . from the point of view of wage or salary assessment' (1969 127 CAR 1142, 1159). This reduced the scope for the market defence arguments that have plagued equal pay claims in other countries.

A second Equal Pay Case brought by the ACTU in 1972 (1972 147 CAR 172) overcame some of the limitations of the 1969 principles by broadening the scope from 'equal work' to 'equal value', thus opening the door to claims from female-dominated areas of work. The newly elected Whitlam government supported the case, giving its brief to Mary Gaudron,[14] who argued the case for equal pay for equal value and intimated that, in line with its intention to ratify ILO Convention 100, the government would support extension of the male minimum wage to females (Ryan and Conlon 1989: 169).

In its decision, the Commission noted the 'world wide trend towards equal pay for females', particularly legislation adopted in New Zealand and the United Kingdom, and concluded that the 1969 concept of 'equal pay for equal work' was 'too narrow for today's world'. Its response was to develop a new principle, which again was to be phased in to avoid any adverse economic impact. The new principle sought 'a single rate for an occupational group or classification . . . whether the employee be male or female', an outcome to be delivered through work value comparisons. In order to ensure this process would be more inclusive than the 1969 principles, the decision allowed that, while comparisons should ideally be made within awards, it might be necessary in some cases to compare with male or female classifications across awards (1972 147 CAR 172, 178, 180).

In reality, however, comparisons across awards were rarely undertaken, and there was little qualification of how 'work value' and potential gender bias would be investigated, other than to assert that this would require 'the exercise of the broad judgement that has characterised work value inquiries' (1973 149 CAR 172, 179; Short 1986). Bennett (1988: 535–40) has observed that there are functional advantages for the Commission of vaguely defined work value guidelines, and that comprehensive approaches to the reassessment of work value would be highly labour intensive. Furthermore, it is not clear that alternative methods of job evaluation would necessarily deliver better outcomes, as gender bias is so deeply embedded in these processes (Burton 1988). Nevertheless, the 1972 principles were clearly hampered by an inability to compare effectively dissimilar work and reassess work value in female-dominated areas. Furthermore, the types of strategies unions were adopting in the 1972–75 period of relative decentralisation and high wage growth were not conducive to sustainable equal pay claims, but rather encouraged 'quasi equal pay through consent agreements' (O'Donnell and Golder 1986: 79).

The remaining barrier to formal gender equality in the wage determination system – maintenance of a higher male minimum wage in recognition of men's family responsibilities – was removed in 1974. The achievement of equal minimum rates was of considerable concern to the Whitlam government, which saw it as a necessary step prior to ratification of ILO Convention 100 (Gaudron 1982: 107). The Women's Electoral Lobby (WEL) played a crucial role in this case, with Edna Ryan's use of figures from the Henderson Inquiry into Poverty showing that there were over 130 000 families dependent on the mother's earning power (Sawer 1990: 4–5). WEL also estimated that there were around 300 000 women under federal awards who received less than the male minimum wage (Gaudron and Bosworth 1979: 167). The tribunal finally conceded that the logic embodied in the *Harvester* judgment was no longer applicable, and that it was not after all possible to discriminate between workers on the basis of their family obligations:

> We do not have the information to enable us to discriminate between the varying needs of . . . workers. In our awards we do not distinguish between the married and the single workers, and we do not vary the wage in relation to the number of persons dependent on the worker . . . For the reasons mentioned we believe the family component should be discarded from the minimum wage concept. (1974 157 CAR 293, 299)

Unlike the 1972 principle, this decision was not dependent on unions bringing cases, nor did it involve questions of work value. The capacity to deliver such a change through a system of awards with comprehensive coverage was clearly one of the advantages of the Australian system in comparison with more decentralised wage-fixing arrangements. Similarly, in spite of the limitations mentioned, the design and implementation of the 1969 and 1972 decisions were also enhanced by aspects of the wages system. Although wage decisions in Australia were clearly influenced by the market, particularly with increasing reliance on 'capacity to pay', principles of wage justice and wage-fixing practice could be constructed to avoid the more market-driven barriers to equal pay experienced elsewhere, such as the definition of 'equal value' as market value to an employer and the limitation of cases to single enterprises. Not only was the scope for objections against pay equity decisions narrowed but benefits could also be delivered more effectively through the labour market; and the 'comparator' problem (the lack of a suitable male against whom to compare a woman's job) was not so much an issue in the award-based system, where comparisons were made between job classifications rather than individuals. A more indirect benefit was the comparatively compressed wage structure of a centralised system.[15] As Gregory, Daly and Ho (1986) show, the larger impact of equal pay decisions in Australia compared with the United Kingdom can be partly attributed to the better pay of Australian men at the lower end of the wage distribution; and a number of cross-national studies have established the advantage of centralised wage determination for pay equity outcomes (O'Donnell and Hall 1988; Gregory et al. 1989; Whitehouse 1992).

The effect of the equal pay decisions is illustrated in Figure 5.3, which shows that women's weekly minimum wages rose from 73 to 93 per cent of men's over the 1970s, with similar increases in average total earnings over this period.[16] It is clearly a more dramatic change than could be accounted for by changes in the human capital attributes of women or their occupational distribution, and undoubtedly reflects the institutional context of the Australian wage determination system. Figure 5.3 also shows, however, the limited advancement that has

MARY GAUDRON'S INTERVENTION

Following the 1972 'equal pay for work of equal value' award, the 1974 National Wage Case included an application by the ACTU for the same national minimum wage to apply to both male and female adult workers. The application was supported by the Australian government, which was represented by Jim Staples QC and Mary Gaudron.

Late on the morning of 26 March, as Barry Maddern was presenting the employers' submission in the large courtroom at 451 Little Bourke Street, about thirty women burst into the hearing, waving placards and drowning the hearing with a loud-hailer. They were members of a recently formed group known as Women for Equal Minimum Wage.

The President, Sir John Moore, uttered his usual disarming words of welcome and requested them to put down their placards and to follow the proceedings in silence. But when the women responded with loud and persistent abuse, he ordered an adjournment. As the six members of the bench began to file out of the courtroom, the women advanced past the bar table towards the bench calling out, 'Cowards! Cowards!'

The three judges' associates wrestled with the demonstrators but some broke through, and picking up the jugs of water on the table they began to pour water all over the bench. In the middle of this melee, Mary Gaudron went up to them with the advice: 'The feds will be here in a second. You'd better piss off fast.' They took her advice and took to their heels. And the Commission resumed soon after.

(Anonymous witness)

occurred since the 1970s, in spite of legislative initiatives including the *Sex Discrimination Act 1984* and the *Affirmative Action (Equal Opportunity for Women) Act 1986*. While some may view the limited change in the gender pay gap after the 1970s as evidence that wage equity has effectively been achieved, others (for example, Short 1986) argue that issues such as the undervaluation of female-dominated work have not been adequately resolved.

Several attempts were made during the 1980s to address this problem, for although the Commission had initially set a two-and-a-half year time limit on implementation of the 1972 decision, it continued to allow cases to proceed. However, with the advent of the ALP–ACTU Accord, the Commission was also required to adhere to principles of wage restraint; hence, Equal Pay cases that came before it tended to be channelled into anomalies processes that reduced the risk of flow-ons. These tensions are clearly evident in the 1986 test case seeking revaluation of nurses work on the basis of 'comparable worth', through a variation to the Private Hospitals and Doctors' Nurses (ACT) Award (1986 300 CAR 185).[17] The notion of 'comparable worth' was explicitly rejected as inconsistent with the Australian approach to wage fixation, not only because of its capacity for application across any kind of job classification but also because it implied a notion of work value as 'value to an employer'. In combination with the risk of generating flow-ons, it was seen as an approach that 'would strike at the heart of long accepted methods of wage fixation in this country and would be particularly destructive of the present Wage Fixing Principles' (1986 300 CAR 185, 190). The claim failed, in part, because it was presented in a way that ignored the constraints under which the Commission operated (Bennett 1988); yet, as Rafferty (1994: 456) notes, 'rejection of the concept of comparable worth was more apparent than actual', with comparisons of dissimilar types of work undertaken in a number of previous and subsequent cases. The 1985 *Australian Public Service Therapists* case, for example, compared female-dominated therapy jobs with a range of different science-qualified professionals on the basis of qualifications, application of scientific principles and work value factors such as responsibility and complexity; and delivered significant gains for women (Rafferty 1994: 456).

In the 1986 *Nurses* case, use of the anomalies process did produce wage gains, although in this and a number of other cases (for example, the *Dental Therapists Anomalies* case of 1989) there was little evidence of work value assessments in the anomalies process (Rafferty 1994: 455). Overall, then, while there have been means of improving pay in female-dominated work through the system, these have not always been explicitly based on the application of the equal pay principles or direct attempts to assess work value. Further indirect avenues to advance equal pay became available to some extent with the structural efficiency principles adopted towards the end of the 1980s and the associated Minimum Rates Adjustment (MRA) process. Under MRA, for example, comparisons across dissimilar forms of work allowed significant revaluation of some female-dominated occupational groups such as clothing workers (McDermott 1993: 545). The move towards enterprise bargaining in the early 1990s, however, inevitably eroded the capacity for such indirect gains, and at the same time created a new set of difficulties for the prosecution of Equal Pay cases.

Decentralisation

The move towards decentralised wage determination in the 1990s brought a new set of tensions into the relationship between the industrial relations system and gender equity. While risks for women under 'enterprise bargaining' were noted both by outside observers (Bennett 1994b; Hall and Fruin 1994) and within the Commission itself,[18] employment rights such as equal pay and parental leave were given more formal status through inclusion in the *Industrial Relations Reform Act 1993* and subsequently in the *Workplace Relations Act 1996*. These legislative moves were made possible by the ratification of international conventions, including ILO Convention 100 (Equal Remuneration) and ILO Convention 156 (Workers with Family Responsibilities). The question thus raised was whether these formal rights might compensate for anticipated risks associated with decentralisation.

In terms of parental rights, the provisions in the Act ensured equal access for all employees to the entitlements previously established under the ACTU-led Maternity Leave (1979) and Parental Leave (1990) test cases – that is, fifty-two weeks unpaid leave, able to be shared between parents of a newly born or adopted child, and accessible to employees with twelve months continuous service. Further extension of parental rights in the 1990s were attained not through the legislation, but again through ACTU-led test cases. These included the Family Leave test cases of 1994–95, which allowed the use of different forms of leave for

family purposes, and the extension of unpaid parental leave to casuals in 2001. This delivery of parental rights through test cases lends some strength to the depiction of Australia as a type of 'wage-earners' welfare state' in which gaps in social provision are filled through the wages system. In adopting this approach, however, the scope for paid maternity and parental leave has been restricted, as in the absence of a national social insurance fund, the costs of an agreement reached in the industrial relations system would fall directly on employers. Moreover, although the test case approach has still been accessible under the more decentralised arrangements of the 1990s, the capacity to disseminate benefits evenly is diminished as award coverage narrows and negotiation over details is devolved to workplace level.

There has been a similar tension between new opportunities provided for pay equity by the legislation and the narrowing scope for implementation in a more decentralised context. The difficulties of prosecuting pay equity in the new environment were illustrated most clearly in an application for equal pay lodged by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and the ACTU in December 1995 for some employees of HPM industries (*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries, C No 23933 of 1995*). The application sought equal remuneration between female-dominated groups (process workers and packers) and male-dominated general hands and storepersons. Although the Act's reference to ILO Convention 100 and the term 'equal remuneration' meant that previously excluded aspects of earnings such as over-award payments could be considered, new areas of complexity emerged.

The application was initially referred to conciliation, then to arbitration in 1997, with a decision handed down by Commissioner Simmonds in 1998 (Print P9210, 1998). Complexities included protracted debates over the need to prove discrimination and how it was to be defined, as well as contestation over the proper means of establishing work value. In the course of argument, different pay rates were defended on the basis of market pressures, with turnover rates in the male-dominated jobs cited as necessitating higher pay, and the need for flexibility in over-award payments strongly defended. Additionally, the role of specific comparators became a central issue, with an attempt by the employer to avoid comparison by declaring the male positions redundant (Hunter 2000: 15; Whitehouse et al. 2001: 380). Although the Commission did not allow these moves to invalidate the comparison, neither did it accept the unions' arguments that the competency standards in the award provided an appropriate basis for determining equal value, and after almost three years' negotiation the issues were finally resolved outside the Commission, leaving no guidelines to inform subsequent cases. Moreover, the case's enterprise basis meant that the final agreement affected only a small number of workers; and in the context of the more limited award system and variation in pay rates associated with enterprise bargaining, it would be difficult to prosecute cases at a broader level (Hunter 2000: 15). Thus, the advantages of more formal pay equity rights have proved somewhat elusive within the decentralised environment.[19]

Additional concerns for pay equity in the context of the move to enterprise bargaining are the indirect effects of decentralisation, such as erosion of the wage compression that had previously enhanced efforts for pay equity. Although a trend towards wage dispersion in Australia predates the adoption of enterprise bargaining, the new system is expressly designed to extend wage flexibility. Among the divisions that have emerged within the wages structure over the 1990s is the pay gap between those covered by awards only and those able to access gains through collective or individual agreements. In 2000, average weekly earnings in the 'award only' stream were around 60 per cent of those for employees covered by registered collective agreements, and both women and part-time workers were over-represented in the award-only group. Among those covered by enterprise agreements, concerns that women's lower levels of unionisation and bargaining power would disadvantage them relative to men have been given some credence by evidence from agreements databases of lower average wage increases in female-dominated, compared with male-dominated, agreements (Whitehouse and Frino 2003: 581–2, 586).

These changes have occurred in the context of a continued expansion of part-time employment, reflecting both structural developments in the economy and women's use of part-time work as a means of combining work and family responsibilities. By 2001, 28 per cent of Australian employees (and 45 per cent of female employees) worked part-time, and much of this employment was casual. While part-time work provides the flexibility to assist women (and men) in attaining sustainable work–family balance, a further tension in the system at the beginning of the twenty-first century is between the positive potential of non-standard employment and the reduced capacity to regulate the conditions of such

jobs and limit casualisation under less comprehensive awards and devolution of negotiation to workplace level.

CONCLUSION

One hundred years after the establishment of a formal system of wage determination at federal level in Australia, notions of wage justice and the capacity to overcome inequities for groups such as women and Indigenous workers have undergone considerable change. Early principles of wage justice manifest in a living wage for male breadwinners and comparative wage justice across different sections of the labour market have been displaced by wage-fixing principles more aligned with a perceived need to extend flexibility and market responsiveness. On the other hand, explicit discrimination against women and Indigenous workers has been largely eliminated.

These changes have had mixed implications for the pursuit of social equity in wages. For example, while erosion of a 'family wage' for men was an essential prerequisite for the pursuit of gender pay equity, what was lost in its elimination was not only its gender bias, but also a mechanism for a 'fair' wage as a necessary element of industrial citizenship. Although a gender-equitable living wage is theoretically possible, the problem since the 1990s has been that the types of wage justice implicit in a social wage and in comparative wage justice across the labour market are difficult to reconstruct in a decentralised environment. Thus, while the ACTU has pursued the goal of a (degendered) social wage, for example in the 1997 Living Wage Case, in an industrial relations system oriented towards encouragement of enterprise bargaining, there is little scope for substantial increases in award-based wages that would bring them closer to those settled under enterprise bargaining. Notwithstanding the provision in the present Workplace Relations Act that the Commission is required to take account of the Racial, Sex and Disability Discrimination Acts, for both women and Indigenous workers there remain risks in a system that grants a formal equality in the absence of broader notions of wage justice. It is thus the combination of different forms of wage justice, rather than some types at the expense of others, that are necessary for future advances in justice and equity.